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No. 85-1277

Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA and
CRAIG MARSH, Individually and as Superintendent
of Schools of Nassau County, Florida,
Petitioners,

v.

GENE H. ARLINE,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

**BRIEF OF THE AMERICAN MEDICAL ASSOCIATION
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS**

Of Counsel:

KIRK B. JOHNSON
AMERICAN MEDICAL
ASSOCIATION
535 N. Dearborn Street
Chicago, Illinois 60610
(312) 645-4600

BENJAMIN W. HEINEMAN, JR.*

CARTER G. PHILLIPS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Attorneys for the Amicus Curiae

* Counsel of Record

July, 1986

QUESTIONS PRESENTED

1. Whether the contagious, infectious disease of tuberculosis constitutes a "handicap" within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

2. Whether one who is afflicted with the contagious, infectious disease of tuberculosis is precluded from being "otherwise qualified" for the job of elementary-school teacher, within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

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**BRIEF OF THE AMERICAN MEDICAL ASSOCIATION
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INTEREST OF AMICUS CURIAE

Amicus American Medical Association ("AMA") is a private, voluntary, non-profit organization of physicians. The AMA was founded in 1846 to promote the science and art of medicine and the improvement of public health. Today, its membership exceeds 280,000 physicians and medical students nationwide.

The AMA's specific interest in this case is to assist this Court in establishing an appropriate framework for

analyzing claims of employment discrimination brought under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, by those suffering from communicable diseases. A proper framework will help lower courts fairly resolve the fundamental tension between legitimate concerns of the medical profession posed by such cases—the need to protect persons handicapped by disease from irrational decisions stemming from prejudice, ignorance or fear and the equally important need to protect innocent third persons from the risk of substantial harm created by those afflicted with communicable diseases. The key to resolving that tension is to ensure that employment decisions by federal fund recipients are reasonably related to reasonable, individualized medical judgments regarding the handicapping disease and the risk to third parties.¹

MEDICAL BACKGROUND

A. Communicable Diseases in the United States

Each year, millions of Americans contract communicable diseases.² See Centers for Disease Control, Morbidity and Mortality Weekly Report, January 3, 1986 at 782 (year-end figures for select diseases). More than 200 different communicable diseases have been identified, ranging from acquired immune deficiency syndrome (AIDS) to zygomycosis (a fungal infection) and includ-

¹ Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Copies of those letters have been filed with the Clerk of the Court.

² The words "communicable," "contagious" and "infectious" are sometimes used interchangeably. Depending on their context, however, their meaning can vary. "Communicable disease" or "infectious disease" usually refers to a disease that is capable of being transmitted to others at some time, although a person with a communicable or infectious disease may not currently be capable of transmitting it. When someone is currently capable of transmitting a disease to others, he or she is referred to as being "contagious," "infectious" or (less frequently) "communicable." Dorland's Illustrated Medical Dictionary at 293, 301, 664 (26th ed. 1981).

ing chickenpox, the common cold, gonorrhea, hepatitis, herpes, influenza, malaria, meningitis, mononucleosis, pertussis, plague, pneumonia, poliomyelitis, syphilis, tetanus and, in the case at hand, tuberculosis. See *Control of Communicable Diseases in Man* (A. Benenson ed., 14th ed., 1985).

The effect of the symptoms of these communicable diseases on afflicted persons range from death to paralysis to runny noses. In some cases, a person with the communicable disease may have no symptoms at all.

Communicable diseases are caused by viruses, bacteria, fungi and parasites. The mode of transmission varies widely. Communicable diseases may be transmitted directly from human to human by touching, biting, kissing, coughing, sneezing or sexual intercourse. Others are indirectly transmitted by contaminated object or medium, such as handkerchiefs, bedding, utensils or blood transfusions. Still others are transmitted from animal to human by, *inter alia*, insect stings or animal bites. *Control of Communicable Diseases in Man, supra*, at 457-58.

A person who "catches" the disease will, of course, ordinarily exhibit the symptoms associated with that disease. The risk that a disease will be transmitted and the risk that, if transmitted, the disease will cause serious harm vary greatly. The American Public Health Association has divided communicable diseases into five classes (with several subclasses) based on the relative need for an investigation and the need to start control measures to protect the public health. They range from Class 1 diseases, which must be immediately reported to health authorities, such as plague, polio and influenza, to Class 5 diseases, for which an official report is not ordinarily required, such as the common cold. *Control of Communicable Diseases in Man, supra*, at xxii-xxiv. Tuberculosis is classified as a Class 2B disease, as are gonorrhea, leprosy and measles; cases are to be reported to local health authorities by the most practicable means and

those reports should be forwarded to higher health authorities weekly by mail. *Id.* at 414, xxiii.

B. Tuberculosis

In the past, tuberculosis was known as the "white plague" because it killed so many people. Glassroth, Robins & Snider, *Tuberculosis in the 1980s*, 302 New Eng. J. Med. 1441 (1980). Today, medicine can treat, cure and even prevent the disease. Nonetheless, in 1978, 28,521 cases of tuberculosis were reported in the United States, 2,914 of which were fatal. In 1982, the most recent year for which statistics are available, 25,520 cases were reported nationwide, resulting in 1,807 deaths. U.S. Department of Health and Human Services, *Tuberculosis in the United States, 1982* at 2 (1985). Deaths generally occur today because the disease is diagnosed late in its development, or because victims have other illnesses or medical problems or do not regularly take appropriate medication. Davis, Carpenter, McAllister, Matthew, Bush & Ognibene, *Tuberculosis: Cause of Death in Antibiotic Era*, 88 Chest 726 (1985).

The infectious agent in tuberculosis, *Mycobacterium tuberculosis* (tubercle bacillus), is carried on airborne droplets. These droplets are produced when persons with pulmonary tuberculosis in or around their lungs sneeze, cough, speak or sing. Once released, the particles disperse throughout a room, suspended in the air. If a droplet is inhaled, the bacteria may implant in the respiratory tract. There, the bacteria may multiply and spread through the lymphatic system and the bloodstream. American Thoracic Society, *Diagnostic Standards and Classification of Tuberculosis and Other Mycobacterial Diseases* (14th Edition), 123 Am. Rev. Respiratory Disease 343, 344 (1981) (hereafter "*Diagnostic Standards*"); *Harrison's Principles of Internal Medicine*, 1020 (10th ed. 1983); *Merck Manual of Diagnosis and Therapy* 127 (14th ed. 1982).

The newly infected host has a tuberculosis infection, but he or she does not have and may not contract the disease

tuberculosis. This distinction is important. Millions of Americans have tuberculosis infection, many of them infected years ago when the disease was more common. But only a small percentage of those infected develop the disease; only those with the disease can suffer any impairment (not all do); and only those with the disease in or around their lungs can transmit the infection to other people, because only they can exhale tuberculosis bacteria. Not all persons with the disease of tuberculosis are contagious, although most with pulmonary tuberculosis are. Tuberculosis infection will usually produce a positive reaction to a tuberculin skin test. Whether a person has the disease and is infectious can be determined by analyzing a smear of sputum (material ejected from the lungs), either by staining the smear (which can be analyzed immediately) or by culturing the bacteria (which takes several weeks but is more sensitive). X-rays are used to reveal the presence of the disease, but cannot reveal whether it is contagious. Glassroth, Robins & Snider, *supra*, at 1441-43; *Harrison's Principles of Internal Medicine, supra*, at 1025-26.

About five percent of newly infected persons contract the disease within weeks or months. Far more commonly, the infection heals but leaves nodules in the lungs and elsewhere in the body. In most people, the nodules remain stable and eventually may calcify. But, if untreated, the infected person carries the risk of tuberculosis for the rest of his life. In five to fifteen percent of cases, one of the nodules breaks down (most commonly in the lungs) causing tubercle bacilli to multiply, and the person becomes ill with the disease of tuberculosis. Glassroth, Robins & Snider, *supra*, at 1441-42; *Diagnostic Standards, supra*, at 344. If properly treated with antibiotics, the infection is unlikely to develop into the disease. Glassroth, Robins & Snider, *supra*, at 1446-47; *Harrison's Principles of Internal Medicine, supra*, at 1029.

How contagious someone with the actual disease is varies from case to case depending upon the number

of bacilli in the individual's sputum. The risk of the diseased person transmitting the infection to others also varies with the closeness and length of contact and with how well ventilated the surroundings are. American Thoracic Society, *Control of Tuberculosis*, 128 Am. Rev. Respiratory Disease 336, 338-39 (1983) (hereafter "*Control of TB*"). The risk of the infection developing into the disease is highest in children under three years of age, lowest in later childhood, and high again in adolescents and young adults. Comstock, Livesay & Woolpert, *The Prognosis of a Positive Tuberculin Reaction in Childhood and Adolescence*, 99 Am. J. Epidemiology 134 (1974). Susceptibility at all ages is increased by various conditions, including malnutrition, silicosis, diabetes and alcoholism. *Control of Communicable Diseases in Man*, *supra*, at 412; *Diagnostic Standards*, *supra*, at 344; Comstock, *Frost Revisited: The Modern Epidemiology of Tuberculosis*, 101 Am. J. Epidemiology 363, 374 (1975).

The disease of tuberculosis manifests itself through a variety of symptoms. Some diseased people have no symptoms at all. J.A. 6; *Diagnostic Standards*, *supra*, at 346. Most experience persistent fatigue, loss of appetite, weight loss, irregular menses, low-grade fever or a combination of these ailments. Pulmonary tuberculosis (tuberculosis of the lungs, which is the most common form of the disease) characteristically produces a slight cough that worsens slowly over weeks or months. J.A. 6-7; *Diagnostic Standards*, *supra*, at 346. The disease may attack other organs besides the lungs, including the pleura (membranes around the lungs), the genitourinary tract, lymph nodes, bones and joints, meninges, peritoneum and other parts of the body. *Diagnostic Standards*, *supra*, at 346-47. If untreated or treated too late, tuberculosis may cause acute respiratory and other problems, and may lead to death.

People with the disease of tuberculosis are no longer sent to sanatoria; they are not generally quarantined or

hospitalized for the purpose of isolating them. Standard treatment is for patients to stay home and take daily doses of antibiotics. People in contact with the patient should receive preventive antibiotic treatment. Proper drug treatment will render most patients noninfectious in a brief period of time, usually in several days to a few weeks. They are then able to resume normal activities. *Control of TB*, *supra*, at 339-41; Glassroth, Robins & Snider, *supra*, at 1443-1444. Some with the disease can return to work immediately after being examined if there is no bacteria in the sputum. On the other hand, diseased individuals with a large number of organisms in the lungs may require several months to become noninfectious. After the patient becomes noninfectious, several more months of drug treatment are required to assure that the disease will not recur. Glassroth, Robins & Snider, *supra*, at 1445-46.

Florida state laws implicitly recognize that individualized decisions should be made about the risk posed to others by a person with tuberculosis. They require that the diseased person "has active tuberculosis and is dangerous to the public health" before requiring medical treatment. Fla. Stat. Ann. §§ 392.25, 392.26 (West 1986) (emphasis added). States commonly have communicable disease statutes that allow public health officers to isolate diseased persons based on their evaluation of a particular case, but the statutes do not establish blanket rules concerning the appropriate response to communicable diseases. See, e.g., N.Y. Public Health Law § 2120 (McKinney 1985); Cal. Health and Safety Code § 3285(d) (Deering 1982). Similarly, while some states have laws requiring teachers to refrain from teaching when they have a contagious disease, those laws do not require that a teacher be fired. They leave employment decisions to the discretion of the employer. See, e.g., Ariz. Rev. Stat. Ann. § 15-505(b) (1984) (specifying that "[a]ny continuing teacher who requests a leave of

absence [because of pulmonary tuberculosis] shall be granted a leave of absence"); Ill. Rev. Stat. ch. 122 § 24-5 (Smith-Hurd Supp. 1986); N.J. Stat. Ann. § 18A:40-10 (West 1968); N.Y. Education Law § 913 (McKinney Supp. 1986); Mass. Ann. Laws ch. 71, § 55B (Michie/Law. Coop. Supp. 1986); Minn. Stat. Ann. § 125.17 subd. 4(4) (West 1979); Tex. Rev. Civ. Stat. Ann. art. 4477-12 § 5 (Vernon Supp. 1986); Va. Code § 22.1-300 (1985).

C. Respondent's Tuberculosis

The record in this case reveals remarkably little regarding respondent's medical history and physical condition. The district court found, "No question that she suffers a handicap," but made no specific findings about respondent's medical history or condition. (Pet. App. C.)

The only medical witness in the case testified that respondent's medical records indicated that she had four positive tuberculosis cultures, indicating the presence of the disease, in 1957, 1977, and in March and November, 1978. J.A. 11-12. The only evidence of any physical impairment were affirmative answers to the questions: "[W]hether Mrs. Arline ever had the illness in an acute form in such a degree that it affected her respiratory system?" and "Was she ever hospitalized with the illness?" J.A. 11.

The severity or duration of respondent's illness is not clear. Nor is it clear when, why, or for how long she was hospitalized; what treatment, if any, she received; or how she responded to it. In May, 1981, respondent had a negative culture, indicating an absence of the disease, and apparently has had no subsequent positive cultures. J.A. 20.

Three reactivations of the disease of tuberculosis (or the continuation of one over more than a year—the record says nothing regarding any negative tests in the 1977-78 period) are extremely rare in properly treated

cases. *Control of TB, supra*, at 340. It is possible that respondent had a rare, resistant strain of tuberculosis. It is possible that she did not have an appropriate course of treatment. It also may be that she failed to take medicine which may have been prescribed for her. But the record simply does not address critical issues which are highly relevant to a proper disposition of any Section 504 case based on infectious disease—the severity and duration of respondent's physical impairment, the degree of infectiousness and the prospects for successful treatment.³

SUMMARY OF ARGUMENT

This case of first impression requires the Court to apply Section 504 to employment decisions made by recipients of federal funds regarding individuals suffering from communicable diseases. Millions of Americans suffer from communicable diseases annually, and communicable diseases, which range from polio to the common cold, vary widely in their impact on those afflicted and on those exposed. This case thus requires the Court to resolve a fundamental tension between protecting persons handicapped by a communicable disease from irrational discrimination and protecting third parties put at substantial risk by persons afflicted with such diseases.

The touchstone for resolving that tension under Section 504 and for thus ensuring that employment decisions about the handicapped ill are not made as a result of fear, stereotypes or prejudice is to require that recipients make reasonable employment decisions based on reasonable, individualized medical judgments about the nature, degree and duration of the handicap, if any, caused by the disease and the nature, degree and duration of risk to third parties.

³ The medical witness testified that she regarded respondent as "not highly infectious" in 1979 and that the possibility of her still being infectious at the time of the trial in 1983 was "remote." J.A. 42-43.

Unfortunately, this case of national importance comes before the Court on a sparse factual record. The district court did not make detailed findings about respondent's specific disease and its impact on her major life functions nor about the risk she posed to students. *Cf.* Fed. R. Civ. P. 52. The court of appeals' brief opinion does not cite to any part of the record developed at trial. Given the complexity and variety of communicable diseases and given the inadequate record presented on review, this Court should not attempt to resolve this specific controversy definitively but should instead offer general guidance for the lower courts to follow on remand. A cautious approach is warranted because this is the first Section 504 communicable disease case granted plenary review by this Court. But, given the current health care crisis relating to Acquired Immune Deficiency Syndrome ("AIDS"), it will, almost certainly, not be the last.

(A) With respect to the first question presented, this Court should not issue a blanket rule about whether persons suffering from the disease of tuberculosis are handicapped. It should affirm the court of appeals' ruling that the Rehabilitation Act's definition of "handicapped individual" does not categorically exclude all those who suffer from a communicable disease. Although it appears that respondent may have been handicapped in a statutory sense, this Court should vacate the judgment below that *all* persons with tuberculosis are handicapped with instructions to remand the case to the district court to determine the medical facts relating to the nature, degree and duration of respondent's impairment. Only after these findings of *medical* fact have been made can a district court determine whether respondent satisfies the *legal* requirement that her impairment "substantially limits major life activities" or that she otherwise falls within the statutory definition. The disease of infectious tuberculosis may have limited impact on an individual's activities, although prejudice against those with tuber-

culosis may, in particular cases, still require a holding under the statutory definition that a person is "handicapped" for purposes of Section 504.

(B) With respect to the second question presented, this Court again should refrain from issuing a blanket rule about whether persons suffering from infectious tuberculosis are "otherwise qualified" to serve as elementary school teachers. In many cases today, drug therapy can arrest the disease, remove infectiousness and prevent a recurrence of both the disease and infectiousness. After a short work leave for treatment, a tuberculosis patient may pose no risk to others. In certain limited circumstances, such therapy may be less successful. In other words, although persons should not teach while contagious with tuberculosis, it does not follow that such persons may reasonably be fired if treatment renders them noncontagious within the employer's normal period for sick leave or leave without pay.

The court of appeals correctly remanded this case to the district court for individualized findings relating to the risk posed to students by respondent. Only after findings of medical fact have been made relating to the risk to third parties posed by ill handicapped individuals can courts address the legal question of whether that person is "otherwise qualified" for employment. The court of appeals, however, erred in its instruction that the Nassau County School Board has an affirmative obligation to find respondent another job, even if she were not otherwise qualified for her present job and even if the School Board does not have an existing policy of providing alternative employment in like circumstances.

(C) An alternative framework suggested by the Justice Department for applying Section 504 in the context of employment decisions about individuals handicapped by AIDS, which logically applies to all communicable diseases, is incorrect as a matter of law and sweeps far too

broadly. Although one effect of a handicap may be that it poses a risk of harm to others, employers should not, as the Justice Department suggests, be allowed to discriminate irrationally against a handicapped individual based on a fear of such risk. The better course prescribed by Section 504 is to determine whether such a handicapped individual is "otherwise qualified" for employment by asking whether an employer has made a reasonable decision based on a reasonable medical judgment about the risk to third parties.

ARGUMENT

I. A PERSON AFFLICTED WITH A COMMUNICABLE DISEASE MAY BE "HANDICAPPED" UNDER SECTION 504

A. Legal Standards

Section 7(7)(B) of the Rehabilitation Act of 1973, as amended in 1974, defines a handicapped person covered by the anti-discrimination provisions of Section 504 as follows:

"any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. 706(7)(B).⁴

This statutory definition was explicated in the general Section 504 regulation issued by the Secretary of Health, Education, and Welfare in 1977. 42 Fed. Reg. 22676 (1977); 45 C.F.R. 84.3(j). A "physical or mental impairment" is defined as:

"(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one

⁴ In 1974, Congress broadened the scope of the statutory definition of "handicapped individual" as used in Section 504. Pub. L. No. 93-112, 87 Stat. 361. See S. Rep. No. 93-1297, 93rd Cong., 2d Sess. 37-38 (1974).

or more of the following body systems: neurological, musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 45 C.F.R. 84.3(j)(2)(i).

"Major life activities" include, but are not limited to, functions such as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 45 C.F.R. 84.3(j)(2)(ii).

The initial inquiry under part (i) of the statutory definition is to determine the *medical* facts about: (a) whether a person is suffering from a physical or mental impairment (from a physiological disorder, cosmetic disfigurement, anatomical loss or mental/psychological disorder); (b) the degree to which that impairment affects major life activities; and (c) the duration of both the impairment and its impact on major life activities. Once the trial court has found the medical facts on these issues, it must then decide the *legal* question of whether the degree and duration of the impairment constitute a *substantial* limitation on major life activities in the statutory sense.⁵ The definition of handicapped does not include those whose impairments impose limitations on major life activities that are "insubstantial."

The statutory requirement of "substantial" limitation on a major life activity is defined neither in the statute nor in the general 1977 Section 504 regulations. See 45

⁵ Parts (i) and (ii) of the statutory definition must be satisfied with medical evidence, and thus the inquiry into medical facts under part (ii) is similar to the inquiry under part (i). Part (iii), however, may be satisfied by subjective evidence of an employer's or "other's" attitudes about the person claiming unlawful discrimination. 45 C.F.R. 84.3(j)(2)(iv) and App. A at 311.

C.F.R. Pt. 84, App. A, at 310 (1985) (no blanket definition possible).⁶ Nonetheless, the definition strongly indicates that a person suffering from an impairment that is not chronic, but is instead of limited duration, may nonetheless be considered "handicapped" for purposes of Section 504. The regulatory history makes clear that a "disease" may be a handicap, and diseases are often of limited duration. See, *e.g.*, 41 Fed. Reg. 20298 (1976); 41 Fed. Reg. 29550 (1976); 45 C.F.R. Pt. 84, App. A at 310-311 (1985).⁷ Moreover, part (ii) of the definition, which may be satisfied independently, refers to those who have "a record of such an impairment," clearly indicating that persons may be handicapped for statutory purposes even if they no longer suffer from a physical or mental impairment.⁸ Part (ii) by necessary implication indicates that a person with a condition of limited duration could be considered "handicapped" under part (i).

Accordingly, a person suffering from a communicable disease of limited duration is a "handicapped person"

⁶ Courts have thus considered the issue on a case-by-case basis. *E.E. Black v. Marshall*, 497 F. Supp. 1088, 1099 (D. Hawaii 1980) (definitions in Rehabilitation Act are "personal" and must be evaluated on an individual basis). See also *Oesterling v. Walters*, 760 F.2d 859, 861 (8th Cir. 1985); *Jasany v. U.S. Postal Service*, 755 F.2d 1244, 1249 (6th Cir. 1985).

⁷ The analysis accompanying the 1977 Section 504 regulations states that the Secretary of Health, Education, and Welfare had no authority under the statute to limit the "term [handicapped] to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps." 45 C.F.R. Pt. 84, App. A at 310 (1985).

⁸ This view is supported by the legislative history. The 1974 Senate Report, which describes the broadened definition of handicapped, states that part (ii) "is intended to make clearer that the coverage of Sections 503 and 504 extends to persons who have recovered—in whole or in part—from a handicapping condition . . ." S. Rep. No. 1297, 93rd Cong., 2nd Sess. 39 (1974).

under part (i) of the statutory definition if the disease *substantially* limits major life activities both in terms of degree of impairment and in terms of the duration of the impairment. This conclusion is consistent with the general approach of the federal courts in construing the term "handicapped person" broadly and then considering the merits of Section 504 suits pursuant to other statutory requirements.⁹

B. Errors Below

The district court did not follow the inquiry mandated by the statute when it determined that respondent was not handicapped in a statutory sense. Instead, citing no legislative materials, no case law and no materials of record, the district court issued a blanket ruling from the bench that no person with a contagious disease falls within the statutory definition:

"No question that [respondent] suffers a handicap and it is most unfortunate that she suffers or did suffer from this particular infectious tuberculosis, but it's difficult for this Court to conceive that Congress intended contagious diseases to be included within the definition of a handicapped person as that act has been implemented and decided by the various courts." (Pet. App. C.)

⁹ *Bento v. I.T.O. Corp.*, 599 F. Supp. 731, 741 (D.R.I. 1984); *Vickers v. Veterans' Administration*, 549 F. Supp. 85, 87 (W.D. Wash. 1982). Attention to both the degree and duration of a handicapping disease is justified in light of the general principle that courts have an independent duty to keep the broad sweep of Section 504 "within manageable bounds." *Alexander v. Choate*, 105 S. Ct. 712, 720 (1985). A person with a three day flu might have major life activities "substantially limited" in terms of degree but not in terms of duration. It is hard to believe that Congress intended Section 504 to reach employment claims of persons so briefly afflicted, unless the claimant could satisfy part (iii) of the statutory definition because he was discriminated against on the basis of an employer's irrational view of his illness. This is, hopefully, a largely hypothetical concern because employers would not likely discharge an employee for having influenza.

This sweeping conclusion is clearly wrong, as the analysis above demonstrates. Whether a person with a communicable disease is handicapped in a statutory sense turns on an *individualized* medical judgment about the nature, degree and duration of the impairment caused by the disease and then on a legal judgment whether that impairment is "substantial."

Although the court of appeals properly ruled that the district court's holding was incorrect as a matter of law, it then erred by not remanding the case for development of the facts under the appropriate legal standards. Instead, without citing to any materials of record or any judicially noticeable medical literature, the court of appeals summarily concluded that all persons with tuberculosis are "handicapped" and that the respondent was handicapped under all three parts of the statutory definition. (Pet. App. A.) It is, of course, elementary that appellate courts should not independently find facts.¹⁰ And it is the sound practice of this Court not to review the record *de novo* and make independent factual findings when the courts below have failed to do so. See, e.g., *City of Kenosha v. Bruno*, 412 U.S. 507, 514 (1973) (remanding in light of district court's failure to make necessary findings on record).

As indicated above, the appropriate approach to Section 504 cases involving individuals with communicable diseases is to require the trier of fact to make findings based on reasonable medical judgments regarding the nature, degree and duration of the impairment. This is true even with respect to tuberculosis, which may substantially impair some victims of the disease yet may have a relatively insubstantial impact on the major life activities of other victims. See pp. 2-4, *supra*. Although it may well be that respondent was sufficiently

¹⁰ See, e.g., *Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982); *DeMarco v. United States*, 415 U.S. 449, 450 (1974); *Green v. Zant*, 715 F.2d 551, 559 (11th Cir. 1983).

impaired to be handicapped under the statutory definition,¹¹ this Court should decline either to issue a blanket ruling that all those suffering from the disease of tuberculosis are handicapped or to apply the appropriate legal standards to the facts put in evidence below in the absence of the necessary factual inquiry by the district court. This conclusion is buttressed by the paramount importance in Section 504 communicable disease cases of making individualized findings of relevant medical facts.

C. Inquiry on Remand

Accordingly, this Court should not, on this record, decide the first question presented by petitioners. It should affirm the court of appeals' holding that an individual with a communicable disease *may* be handicapped under the statutory definitions. But it should vacate the judgment below with instructions to remand the case to the district court to determine, in the first instance, the medical facts relating to the nature, degree and duration of impairment caused by respondent's disease. Only then should the district court consider the legal questions of whether the statutory definition of a "handicapped individual" has been satisfied in light of an individualized set of factual findings.

II. A PERSON WITH A COMMUNICABLE DISEASE MAY NOT BE "OTHERWISE QUALIFIED" FOR EMPLOYMENT UNDER SECTION 504

A. Legal Standards

Section 504 provides that

"No *otherwise qualified* handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of,

¹¹ It appears that respondent's respiratory functions may have been seriously affected and that she needed to be hospitalized. J.A. 11. If so, she could satisfy either part (i) or part (ii) of the statutory definition.

or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794 (emphasis supplied).

As a general matter, an "otherwise qualified" person is one who is able to meet all of a "program's requirements in spite of his handicap." *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979).

In the context of employment, an individual may not be "otherwise qualified" in a statutory sense if, because of the handicap, such person is not capable of performing required work or is a danger to himself or to others at his place of employment.¹² With respect to the last condition, danger to others, it is obviously an implicit requirement of every employment program that employees not unduly put others in the workplace at substantial risk. And it is equally obvious that a person with a communicable disease may not be "otherwise qualified" because the threat of the disease's communicability poses an unreasonable risk of harm to others.

Nonetheless, it is also clear that in any given case the risk to others may be highly remote or may be too insignificant to serve as a reasonable basis for adverse employment actions.¹³ To determine whether a person handicapped by a communicable disease is "otherwise qualified" for employment in light of the potential risks to others, courts should, again, undertake a two-step inquiry.

¹² See, e.g., *Southeastern Community College v. Davis*, 442 U.S. 397, 407 (1979) (risk to others); *Doe v. New York University*, 666 F.2d 761, 777 (2d Cir. 1981) (risk to self and others); *Doe v. Region 13 Mental Health-Mental Retardation Commission*, 704 F.2d 1402, 1410 (5th Cir. 1983) (risk to others). Cf. *New York State Association For Retarded Children, Inc. v. Carey*, 612 F.2d 644, 650 (2d Cir. 1979) (risk to others).

¹³ Cf. *Strathie v. Department of Transportation*, 716 F.2d 227 (3rd Cir. 1983); *Coleman v. Casey County Board of Education*, 510 F. Supp. 301 (W.D. Ky. 1980).

First, courts should find facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm. Assuming the employer has made the employment decision on an assessment of the medical risks, as he should if he is acting in light of an employee's disease, then it is necessary, before a decision regarding the "otherwise qualified" issue can be made, that courts make individualized findings on these risk issues. These findings must be based on the medical evidence evaluated by the employer and other evidence available to the court.¹⁴ Obviously, the likelihood of injury and the extent of harm can vary widely with different diseases and different individual responses to those diseases.¹⁵

Second, courts must make the legal judgment whether the recipient of federal funds has made an employment decision that bears a "reasonable" relationship to a reasonable medical judgment about the nature, degree, se-

¹⁴ The question of appropriate burdens of proof is not presented in this case. See generally, *Doe v. New York University*, 666 F.2d at 776 (allocating burdens of proof). The reasonableness of an employer's decision is analyzed by the courts from the perspective of the medical knowledge an employer had at the time the decision was made. *Bento v. I.T.O. Corporation*, 559 F. Supp. 731, 743-44 (D.R.I. 1984); *Bey v. Bolger*, 540 F. Supp. 910, 926 (E.D. Pa. 1982).

¹⁵ The need for individualized determinations does not preclude an employer from adopting employment policies that establish general health guidelines. Such guidelines would be lawful if they are based on reasonable medical judgments and if they are applied to specific cases based on medical judgments as to whether individuals fall within the guidelines. Cf. *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979).

verity and probability of the risk posed to others by the person handicapped by a communicable disease in light of the employer's general job policies. This particular rule in the context of the risk of communicable diseases is derived from the general rule under Section 504 for deciding the "otherwise qualified" issue, which this Court announced in *Southeastern Community College v. Davis*, *supra*, and restated succinctly in *Alexander v. Choate*, 105 S. Ct. at 720:

"Davis thus struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs; while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones."

See also, 45 C.F.R. 84.12 (requirement of reasonable accommodation in employment cases).

To protect the handicapped ill, Section 504 requires that a federal fund recipient make employment decisions based, not on prejudice or stereotype, but instead on a reasonable medical judgment. To keep Section 504 "within manageable bounds," *Alexander*, 105 S. Ct. at 720, recipients need do no more—and no less—than make a reasonable employment decision in light of those reasonable medical judgments.¹⁸ Cf. *Jacobson v. Massachusetts*,

¹⁸ This general rule regarding communicable diseases finds support in the lower court cases addressing the question of whether a handicapped individual is "otherwise qualified" for employment when the individual poses a danger to others, even though that risk may arise from causes other than a communicable disease. See, e.g., *Doe v. New York University*, 666 F.2d at 777; *Doe v. Region 13 Mental Health-Mental Retardation Commission*, 704 F.2d at 1410.

A federal fund recipient may successfully defend a Section 504 action by making a reasonable employment decision based on medical judgments within a reasonable professional range. Federal courts should not choose between conflicting medical judgments

197 U.S. 11 (1905) (compulsory small pox vaccinations upheld against substantive due process challenge).

B. Errors Below

The district court concluded that respondent was not "otherwise qualified" for her teaching position because she had suffered from an infectious disease. (Pet. App. C.) But, once again, this blanket holding was not justified by any analysis of the risks presented and any findings of fact specifically describing the risk posed by respondent. A court must make findings about the nature, duration, severity and probability of the risk to others before it can determine whether a federal fund recipient's employment decision is reasonably related to a reasonable medical judgment.

Given the lack of findings, the court of appeals was, therefore, correct in remanding the case to the district court and in requiring determinations relating both to the risks in this individual case and any claim by respondent that a "reasonable accommodation" in her present job existed. The court of appeals erred, however, when it directed the district court on remand to determine whether the school board could find respondent "another position teaching less susceptible individuals, or in some other kind of position in the school system." (Pet.

offered by plaintiff and defendant, if defendant recipients can demonstrate that the medical evidence upon which he relied was within the range of reasonableness, given then current medical knowledge. Cf. *Doe v. Region 13 Mental Health-Mental Retardation Commission*, 704 F.2d at 1410-1412. Deference should be given to employment decisions rationally related to reasonable medical judgments relied upon by federal fund recipients. See generally, *Bento v. I.T.O. Corp.*, 599 F. Supp. 731, 744 (D.R.I. 1984) (recipients' actions must have a "reasonable basis"). Cf. *Kampmeier v. Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977) (upholding decision of school officials to exclude students with vision in only one eye from contact sports where the officials "relied on medical opinion that [the] children . . . [were] not qualified.").

App. A.) While employers have an obligation to make a reasonable accommodation for an employee who suffers a handicap while on a job, they do not have an affirmative duty to find an employee another job if the employee is not otherwise qualified for his or her present job and if the employer does not have an existing policy of providing alternative employment. See 45 C.F.R. 84.12 and App. A at 315-316 (1985).

C. Inquiry on Remand

Accordingly, on this record, this Court should not definitively decide the second question presented. Cf. *Gurmankin v. Costanzo*, 556 F.2d 184 (3rd Cir. 1977), *cert. denied*, 450 U.S. 923 (1981) (due process violation for school board to make blanket rule about blind teachers). As indicated above, unless an individual has incurred a particularly virulent strain of tuberculosis that is not susceptible to treatment, drug therapy may completely arrest the disease, remove any infectiousness and prevent its recurrence. Under those circumstances, a person who has previously suffered tuberculosis and who follows the proper course of drug therapy may present no future risk to anyone at the workplace. See pp. 4-8, *supra*.

This distinct possibility underscores the importance of vacating and remanding for further proceedings (a) to make findings relating to the medical facts regarding the nature, duration, severity and probability of risk of harm to third parties in this case and (b) to determine whether the school board's employment decision was reasonably related to a reasonable medical judgment about that risk. Indeed, although elementary and secondary school teachers have to be tested for tuberculosis under state laws,

¹⁷ The general Section 504 regulations promulgated by HEW in 1977 do not require an employer to find an employee, who is not "otherwise qualified," another job. They only require a reasonable accommodation in a present job. See 45 C.F.R. 84.12 and App. A at 315-316.

those states do not have a fixed rule regarding the employment disposition once a teacher is diagnosed as having the disease. See p. 8, *supra*.

III. THE JUSTICE DEPARTMENT'S FRAMEWORK FOR APPLYING SECTION 504 TO EMPLOYMENT DECISIONS REGARDING THOSE HANDICAPPED BY A COMMUNICABLE DISEASE IS INCORRECT

In a recent opinion, the Office of Legal Counsel of the Department of Justice set forth a different approach to the application of Section 504 to employment decisions affecting those with communicable diseases in general and AIDS in particular.¹⁸ With respect to the statutory definition of a "handicapped individual," the DoJ Opinion makes a crucial distinction between (a) the disabling effects of a communicable disease on its victims, which qualify as handicaps, and (b) the ability of the victims to spread the disease to others, which "is not itself a handicap." DoJ Opn. at 27. The Opinion then concludes that, because the ability of the victims of a communicable disease to spread the disease is not a "handicap," Section 504 "simply does not reach decisions based on fear of contagion—whether reasonable or not" Thus, according to the opinion, if an employer discharged an employee based solely on a *fear* of the risk of a disease's communicability, rather than a reasonable medical judgment about that risk, there would be no "discrimination" in a statutory sense "solely on the basis of handicap." *Id.* at 29-32.

This proposed framework does violence to the fundamental Congressional purpose of Section 504 of protecting handicapped individuals from decisions based on fear, prejudice or stereotype. See, *e.g.*, S. Rep. No. 1297, 93

¹⁸ "Application of Section 504 of the Rehabilitation Act to Persons with AIDS, AIDS-Related Complex, or Infection with the AIDS Virus," June 20, 1986 [hereafter "DoJ Opn."]. This opinion has been lodged with the Court by petitioners.

Cong., 2nd Sess. (1974). It also does violence to the statutory language and to the decisions of this Court.

First, and most fundamentally, the Justice Department opinion misconstrues the statutory meaning of a "handicap." Section 504 applies to "handicapped individuals" and Section 7(7)(B) defines "handicapped individuals" as, *inter alia*, "any person who (i) has a physical or mental impairment which substantially limits one or more of such persons' major life activities." The implementing regulations define "physical impairment" as any "physiological disorder or condition . . . affecting one or more of the . . . body systems" 45 C.F.R. 84.3(j)(2)(i). When Section 504, Section 7(7)(B) and the implementing regulations are read together, it is clear that, for Section 504 purposes, a handicap is an impairment that causes certain limiting effects on life activities. But it is the impairment, not just the effects of the impairment on the afflicted individual, that is the "handicap," in the statutory sense. This plain reading of the statute and the regulations is borne out by the analysis of HEW that accompanied the 1977 general Section 504 regulation.¹⁹

Thus, if a disease like tuberculosis substantially limits a person's major life activities, then tuberculosis is the impairment or handicap, including, but not limited to, the effects of that disease. In those circumstances, a federal fund recipient could not, therefore, discriminate against an individual "solely on the basis of" the disease of tuberculosis (including the effects of the disease on the victim and on third parties), unless that individual were not "otherwise qualified" for employment.²⁰ The

¹⁹ See 45 C.F.R. Pt. 84, App. A, at 310 (1985) (the "impairment" is the "handicap", not just the effects of that impairment) and 311 (alcoholism and drug addiction are diseases; diseases are impairments; drug addiction or alcoholism, not just their effects, may be considered handicaps).

²⁰ A person who has no symptoms of a communicable disease but nonetheless carries it may not be handicapped within the statutory

Justice Department's distinction between the effects of an impairment on the individual and the effects on third parties for purposes of determining what is a handicap thus does not find support in the legislative purpose or language or in the relevant regulatory history.

Second, the Justice Department's approach sweeps much too broadly. Many handicapped individuals may pose a degree of danger to others, either by virtue of a communicable disease or for other reasons. See *Southeastern Community College v. Davis*, 442 U.S. at 407 (hearing disability in nurse could pose danger to patients). But, rather than allowing employers to act irrationally toward such handicapped individuals based on a fear of a perceived danger to third parties, the better course, as set forth in *Southeastern Community College*, is to focus on the issue of whether the handicapped individual is "otherwise qualified."

Indeed, this Court has stated that "the question of who is 'otherwise qualified' and what actions constitute 'discrimination' under [Section 504] would seem to be two sides of a single coin; the ultimate question is the extent to which a grantee is required to make reasonable modifications in its programs for the needs of the handicapped." *Alexander v. Choate*, 105 S. Ct. at 720, n.19. Rather than focusing, as the DoJ Opinion does, on different effects of a single handicap and allowing irrational discrimination with respect to one of those effects not deemed a "handicap," the better approach, mandated by *Davis* and *Alexander* and urged by the AMA in this brief, is to require federal fund recipients to take reasonable, but not funda-

definition because being a pure carrier may not, depending on medical evaluations and legal judgments, significantly limit the carrier's major life activities. But it does not follow that a person who is ill with the disease and who meets the statutory definition of "handicapped individual" enacted by the Congress may be irrationally discriminated against because of one of the effects—communicability—of the disabling disease. *Cf.* DoJ Opn. at 29-32.

mental, steps or modifications in accommodating handicapped individuals. In the context of this case, of course, that means federal fund recipients may make employment decisions that are reasonably related to reasonable medical judgments about the risks to third parties posed by individuals with communicable diseases—no more is required but also no less.²¹

CONCLUSION

Accordingly, the AMA respectfully submits that the framework set forth in this brief for analyzing the application of Section 504 to employment decisions by federal fund recipients comports with the statute and fairly resolves the statutory tension between protecting individuals who suffer from a handicapping communicable disease and protecting third parties exposed to risk by those with such a disease. For the limited reasons stated above, the judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted,

Of Counsel:

KIRK B. JOHNSON

AMERICAN MEDICAL

ASSOCIATION

535 N. Dearborn Street

Chicago, Illinois 60610

(312) 645-4600

BENJAMIN W. HEINEMAN, JR.*

CARTER G. PHILLIPS

SIDLEY & AUSTIN

1722 Eye Street, N.W.

Washington, D.C. 20006

(202) 429-4000

Attorneys for the Amicus Curiae

* Counsel of Record

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²¹ Employment decisions about AIDS victims, like decisions about anyone handicapped by a communicable disease, should thus be based on reasonable medical judgments about their handicap and their risk to others and not, as the DoJ opinion would allow, on irrational fear of the handicapped individual's ability to communicate the disease.